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IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 325 326

ERNEST WEISS, IRENE WEISZ, FERENC WEISZ and GEZA FRIEDMAN,

Petitioners,

—against—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

HAROLD ST. L. O'DOUGHERTY,
Counsel for Petitioners.

JOHN R. STARKEY,
EDWIN F. BLANEY,
On the Petition.

INDEX

	PAGE
PETITION FOR A WRIT OF CERTIORARI	1
Jurisdiction	1
Opinion Below	2
Summary Statement	2
The Case Against the Defendants	3
The Main Conspiracy	3
The Canadian Affair	5
The Flushing Incident	6
Questions Presented	8
Reasons Relied on for the Allowance of the Writ	9
Certificate of Counsel	10
BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI	11
1. Jurisdiction	11
2. Statute and Regulations Which Are Involved Herein	11
3. Statement of the Case	12
4. Summary of Argument	12
5. Argument	13

PAGE

POINT I

The Circuit Court of Appeals erred in holding that there was no variance from the charge of a single conspiracy to the proof of three separate and distinct conspiracies 13

POINT II

The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based is constitutional 15

POINT III

The Circuit Court of Appeals erred in holding that the statute upon which the indictment is based did not terminate on June 30, 1942, but was extended by Act of June 30, 1942 16

POINT IV

The Circuit Court of Appeals erred in holding that the defendants were not prejudiced by irrelevant evidence and that the evidence was sufficient to sustain the convictions 18

Geza Friedman 18
Ernest Weiss 18
Ferenc Weisz 30
Irene Weisz 32

POINT V

The Circuit Court of Appeals erred in holding that the Trial Court did not commit reversible error in admitting platinum and Friedman's bank records as part of the Government's case against all of the defendants 32

CONCLUSION 34

Table of Cases Cited:

	PAGE
Berger v. U. S., 295 U. S. 78	9, 14, 15
Caringella v. United States (C. C. A. 7), 78 F. 2d 563, 566	29
Center v. United States (C. C. A. 4) 96 F. 2d 127, 130	29
Dahly v. United States (C. C. A. 8) 50 F. 2d 37, 43	22, 30
Gerson v. United States (C. C. A. 8) 25 F. 2d 49	29
Gorin v. United States, 312 U. S. 19	16
Kassin v. United States (C. C. A. 5) 87 F. 2d 183, 184	22, 29
Lucadamo v. United States (C. C. A. 2) 280 F. 653, 657	31
Marcante v. United States (10th Cir.) 49 F. 2d 156	23
Marino v. United States (C. C. A. 9), 91 F. 2d 691 at page 695	31
Marrash v. United States (C. C. A. 2) 168 F. 225, 231	31
Murphy v. Utter, 186 U. S. 95, 105	17
Panama Refining Co. v. Ryan, 293 U. S. 388	9, 15
Pasadas v. National City Bank, 296 U. S. 497, 503	17
Schechter Poultry Corp. v. U. S., 295 U. S. 495	9, 15
Shannabarger v. United States (C. C. A.) 99 F. 2d 957, 961	22

	PAGE
Terry v. U. S. (C. C. A.) 7 Fed. 2d 28	9, 14
U. S. v. Butler, 297 U. S. 1	9, 15
United States v. Curtiss-Wright Exp. Co., 299 U. S. 388	16
United States v. Dellaro (C. C. A. 2d) 99 F. 2d 781	26
United States v. Falcone, 109 F. 2d 579, aff'd 311 U. S. 205	28
U. S. v. Kissel, 218 U. S. 601, 608	18, 26
United States v. Peoni, 100 F. 2d 401	27
United States v. Schwimmer, 279 U. S. 644, 650	16
United States v. Silva, 131 F. 2d 247, 249	23, 29
U. S. v. Siebricht (C. C. A.) 59 Fed. 2d 976	9, 14 15
United States v. Tynen, 11 Wall. 88	17
United States v. Von Clemm, 136 F. 2d 968	16
Zito v. United States (C. C. A. 7) 64 F. 2d 772, 775	22
Young v. United States (C. C. A. 5) 48 F. 2d 26, 27	22

Other Authorities Cited:

Chapter 508, Section 6, 54 Statutes at Large 712 July 2, 1940 (701, Title 50 USC)	2, 8, 9, 11, 12, 15, 17
15 C. J. S. Conspiracy Sec. 93, p. 1150	26, 30
22 C. J. S. Criminal Law, Sec. 27, p. 79 and cases under note 87	17
59 Corpus Juris, 919	17
Rule 11 of Rules of Criminal Procedure	1
Section 240 (a) of the Judicial Code, as amended, Sections 687 and 688 of Title 18, United States Code	1
56 Statutes at Large 463, June 30, 1942	9, 17

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No.

ERNEST WEISS, IRENE WEISZ, FERENC WEISZ and GEZA FRIEDMAN,

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—against—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Ernest Weiss, Irene Weisz, Ferenc Weisz and Geza Friedman, respectfully represent and petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit as follows:

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, Sections 687 and 688 of Title 18, United States Code, and Rule 11 of the Rules of Criminal Procedure. The judgment of the Circuit Court of Appeals was entered on July 17th, 1945.

Opinion Below

The opinion of the Circuit Court of Appeals has not yet been officially reported. It is found in the printed record.

The only opinion of the lower Court is that of United States District Judge Campbell overruling the demurrers by the defendants, Freier, Ferenc Weisz, Ernest Weiss and Irene Weisz, said decision appearing at folios 4759-4781.

Summary Statement

Petitioners seek to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, affirming the judgment of conviction rendered in the District Court for the Eastern District of New York, adjudging petitioners and Josef Rosenberg, Samuel Freier and Hans Eisler, guilty under an indictment charging that between February 1, 1941 and up to April 14, 1942, the date of filing of the indictment, the seven defendants above-named and two other defendants did unlawfully, wilfully and knowingly combine, confederate, conspire and agree, together and with each other and with various persons specified as co-conspirators but not indicted as defendants, to violate Section 701 of Title 50, United States Code, pertaining to the prohibition or curtailment of exportation of military equipment or supplies or component parts thereof, except under such rules and regulations as should be prescribed by the President, and the regulations and proclamations duly promulgated thereunder by the President of the United States, prohibiting after July 5, 1940, the exportation, among other basic materials, of platinum group metals, without a license provided for in the Presidential Proclamation. The indictment further alleged that part of the conspiracy consisted of the purchase of platinum in the United States, its shipment to nations located in Continental

Europe, particularly Portugal, and the use of crew members on vessels and Clipper planes traveling between the United States and Portugal.

A series of overt acts, the last of which allegedly occurred on June 4, 1941, are listed in the indictment.

The petitioners, Irene Weisz, Ferenc Weisz and Ernest Weiss each received a sentence of 13 months in jail and a fine of $500.00. Petitioner Geza Friedman received a sentence of one year and eleven months in jail and a fine of $5,000.00.

The conviction of all defendants was affirmed by the Circuit Court of Appeals for the Second Circuit by decision dated July 17, 1945.

The defendants, Rosenberg, Freier and Eisler, by separate petition submitted in their behalf by James I. Cuff, Esq., their attorney, are also seeking review of the judgment of affirmance.

The Case Against the Defendants

The evidence relates to three separate and distinct conspiracies. In order to set forth the facts as simply as possible, the conspiracy charged in the indictment has been designated as the Main Conspiracy and the other two as the Canadian Affair and the Flushing Affair.

The Main Conspiracy

The Government's case rests, principally, upon the testimony of its chief witnesses, Hersch Neumann and his brother, Abe Neumann, both of whom were named in the indictment as co-conspirators but not as defendants, and Alexander Koppel, a defendant who had pleaded guilty to the indictment before the trial. These witnesses admitted that they were main actors in the conspiracy and testified

that they, together with Arnold Weisz, the defendant Josef Rosenberg and the defendant Samuel Freier, were the persons composing the group which jointly purchased platinum and shipped it, on four occasions between March, 1941, and May, 1941, to Portugal through the medium of crew members of Portuguese vessels. The proceeds of the sale of the platinum involved in the first three shipments were transmitted to the Neumann brothers and, according to them, shared by the persons composing such group.

The persons named in the preceding paragraph are, solely for the sake of clarity, designated as the "partners", and the alleged shipments by sea and any acts in connection with such shipments as the Main Conspiracy.

Arnold Weisz, a brother of the defendants, Ernest Weiss, Irene Weisz and Ferenc Weisz, is named as a co-conspirator but not as a defendant in the indictment. Arnold did not testify at the trial. Rosenberg and Freier are co-defendants. Both pleaded not guilty to the indictment. Both were convicted.

Ernest Weiss had no connection with the Main Conspiracy.

Ferenc Weisz is alleged to have participated in the Main Conspiracy by acting as agent for his brother Arnold Weisz in collecting from the Neumann brothers the share of the proceeds of the third shipment to which Arnold Weisz was entitled. That payment was made while Arnold was in jail (399). It is also alleged that Ferenc Weisz typed an insurance policy whereby one of the "partners", it is claimed, assumed the risk of loss.

Irene Weisz's connection with the Main Conspiracy is limited to allegations that she handled the platinum, attended conferences of the "partners", obtained a pass to one of the Portuguese vessels and acted as a messenger for Arnold Weisz.

Geza Friedman was a close friend of Arnold Weisz. He had written and printed cablegrams and other papers for Arnold Weisz. The chief witnesses did not mention Friedman's name in their testimony relating to the Main Conspiracy.

The Canadian Affair

The principal witnesses testified to alleged acts of the "partners" in a scheme to send platinum to Canada in April, 1941, between the first and second shipments by sea (163). In substance, their testimony relative to this transaction is as follows: Arnold Weisz, in the presence of the other "partners" and Irene Weisz, stated that he had learned from the defendant, Friedman, that a profit could be made by sending platinum from the United States to Canada. Arnold Weisz suggested that they try that method of selling the metal. Irene Weisz offered to take the platinum to Canada but it was decided to use the defendant, Ernest Weiss, who was not present, for that purpose (168). Abe Neumann said that he and Irene Weisz carried some platinum to Ernest Weiss' store in Brooklyn where the defendant, Ferenc Weisz placed it in a suitcase (1470) which Ernest Weiss thereupon took to Montreal (1473). Several days later Ferenc Weisz returned this platinum to the "partners" (209), and it was subsequently sent to Portugal in the second of the four shipments by sea (1488).

Ernest Weiss (4275-6) and Ferenc Weisz (4219) denied that they handled the platinum or that they had seen Abe Neumann at Ernest's store. Ernest Weiss explained that he had gone to Canada to obtain a visa for Arnold (4271, 4277). Friedman denied any knowledge of the transaction (3846).

The Flushing Incident

The Government produced other witnesses who testified to a scheme by which Arnold Weisz exported platinum to Portugal using stewards employed on the Clipper planes flying between the United States and Portugal.

The witness, Rene Mezenen, named in the indictment as a co-conspirator but not as a defendant, testified that he had been a Flight Steward on the Clipper and had met Arnold Weisz some time late in 1940, or in the early part of 1941. In May, 1941, Arnold Weisz telephoned the witness at his home in Flushing, New York (2907), subsequently called to see him "during the early part of May, 1941" (2908), and "a couple of nights later" gave him some platinum and delivery instructions (2910-2911). Mezenen turned the metal over to another steward, Mario (2912), named in the indictment as co-conspirator but not a defendant.

Some time between three and seven days later, during which period Arnold Weisz informed Mezenen that the first shipment had been received in Lisbon, Arnold Weisz and Mezenen met again and a second delivery was consummated (2913-15). On the evening of June 4, 1941, Arnold Weisz, accompanied by the defendant, Geza Friedman, called at Mezenen's house in a taxicab. Weisz met Mezenen on the street and then returned to the taxi, obtained a package of platinum and delivered the package and written delivery instructions to Mezenen (2928-2932). Friedman took no part in the transaction, remaining in the taxi, and was not seen by Mezenen (2928-2947). The following day Mezenen was arrested with the platinum in his possession (2948). Arnold Weisz was taken into custody shortly thereafter.

Platinum had been purchased by one Felsenberg, using the name of Schreiber, with funds furnished by Arnold

Weisz (2885). Felsenberg made three purchases for Arnold Weisz at the firm of Kastenhuber & Lehrfeld, and one purchase from Jos. B. Cooper & Sons, Inc. (2886). Mezenen testified that the platinum parcels Arnold Weisz had delivered to him were accompanied by letterheads of Kastenhuber & Lehrfeld upon which had been printed some figures relative to the amount and quality of the platinum (2912, 2915). Felsenberg was not named as a co-conspirator. He testified that he dealt with Arnold Weisz alone (2890), did not know the Neumanns (2888), and had never been asked by either Rosenberg or Koppel to purchase platinum (2889).

Arnold Weisz did not disclose to Hersch Neumann or to any of the other "partners" the fact that he was dealing with Mezenen and shipping platinum abroad on the Clipper (504). Hersch Neumann had never been involved in any transaction in which the Clipper had been used, nor did anyone ever tell him that such a method of exportation had been used (505). Hersch Neumann had been a party to all transactions of the "partners" and "in every one of those shipments it was purely the use of boats" (506).

Geza Friedman testified that he had accompanied Arnold Weisz on the trip, by subway and taxicab, to Flushing on the evening of June 4, 1941 and that he did not learn that the package contained platinum until he and Arnold were returning home from Flushing (3870). Friedman did not know Mezenen (3848). Holtzmann, F. B. I Agent, testified that Friedman at first denied that he had seen Arnold Weisz on June 4, 1941, and when later identified by the taxicab driver, Carlson, stated that he had nothing to say (1044). F. B. I Agent Sizoo testified that about a week after Arnold's arrest, Friedman told Sizoo that Arnold, on their way to Flushing, had stated that the package contained platinum (3212).

Questions Presented

(1) Whether the Court erred in overruling the demurrer interposed to the indictment by the petitioners, Irene Weisz, Ferenc Weisz and Ernest Weiss, raising the question of the unconstitutionality of Section 701 subd. 6 of Title 50 USC; the failure of the indictment to state facts sufficient to constitute a crime against the United States; the duplicity of the indictment in that it charged more than one conspiracy in a single count; the lack of authority in the President of the United States to promulgate rules and regulations contained in the executive order of July 2, 1940; the indefiniteness and uncertainty of portions of the said executive order, and the prosecution of the petitioners after June 30, 1942 when the authority under the original enactment ended.

(2) Whether the Court erred in denying petitioners' motions (a. to strike from the record; b. to dismiss; c. to direct a verdict of acquittal; d. to compel the United States Attorney to elect) made at the close of the Government's case and renewed at the close of the entire case. Exceptions were properly noted.

(3) Whether the Court erred in denying petitioners' motions to set aside the verdict. Exceptions were properly noted.

(4) Whether the Court erred in denying the petitioners' motions in arrest of judgment. Exceptions were properly noted.

(5) Whether the Court erred in the admission of evidence concerning the acts and conduct of co-conspirators. Exceptions were properly noted.

(6) Whether the Court erred in admitting testimony concerning the alleged Canadian transaction. Exceptions were properly noted.

Reasons Relied On for the Allowance of the Writ

1. The Circuit Court of Appeals has passed upon the constitutionality of the Statute upon which the indictment is based i.e. Section 701 of Title 50 USC. This act clearly grants legislative powers to the President and falls within the type of legislation proscribed in *Schecter Poultry Corp.* v. *U. S.*, 295 U. S. 495; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *U. S.* v. *Butler,* 297 U. S. 1.

2. The Act upon which the indictment is based terminated before the trial and was not extended by Act of June 30th, 1942 (56 Stat. 463).

3. There is a fatal variance in that the indictment charges one conspiracy and the proof relates to three wholly disconnected offenses. *Berger* v. *U. S.*, 295 U. S. 78; *U. S.* v. *Siebricht* (C. C. A.), 59 Fed. 2d 976; *Terry* v. *U. S.* (C. C. A.), 7 Fed. 2d 28.

4. The petitioners were not accorded a fair and impartial trial. The jury was permitted to consider hearsay evidence, as well as evidence of financial affairs of some of the defendants not shown to be connected with the alleged conspiracy, all of which was highly prejudicial.

WHEREFORE petitioners pray that a writ of certiorari issue out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for review and determination, as provided by law,

this cause and a complete transcript of the record and of all proceedings had therein, and that the order of the United States Circuit Court of Appeals affirming the conviction of petitioners in this case may be reversed and that petitioners have such other and further relief in the premises as this Court may deem proper.

Dated: August 14, 1945.

HAROLD ST. L. O'DOUGHERTY,
Counsel for Petitioners.

JOHN R. STARKEY,
EDWIN F. BLANEY,
On the Petition.

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

Dated: August 14, 1945.

HAROLD ST. L. O'DOUGHERTY,
Counsel for Petitioners.

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On the Petition.